

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**VICKIE S. HAMILTON**

Claimant

VS.

**AMETEK ADVANCED INDUSTRIES, INC.**

Respondent

AND

**ACE AMERICAN INSURANCE CO.**

Insurance Carrier

Docket Nos. 1,043,276  
and 1,050,589

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the June 29, 2010, preliminary hearing Order entered by Administrative Law Judge John D. Clark. E.L. Lee Kinch, of Wichita, Kansas, appeared for claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that the injury to claimant's left knee is a direct and natural consequence of her back injury suffered April 28, 2008.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 29, 2010, Preliminary Hearing and the exhibits; the transcript of the February 17, 2009, Preliminary Hearing and the exhibits; together with the pleadings contained in the administrative file. In addition, pursuant to the request of the parties, the record also includes the September 7, 2010, report of the independent medical examiner, Dr. Paul S. Stein.<sup>1</sup>

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<sup>1</sup> The parties had requested that their briefing schedules be continued and this appeal not be decided until after Dr. Stein's report was received.

### ISSUES

Respondent contends that claimant's left knee injury did not arise out of and in the course of her employment. Respondent states claimant's left knee condition occurred at work when she was walking and turned a corner. Respondent argues the activities of walking and turning corners are normal activities of daily living.

Claimant asserts that her left knee injury occurred as a direct and natural consequence of her work-related back injury suffered April 28, 2008, and the resulting altered gait. Therefore, claimant argues the left knee injury arose out of and in the course of her employment at respondent. In the event the Board finds the knee injury was a new injury distinct from her April 2008 injury, claimant argues the injury would still be compensable because it was caused by activities that were clearly distinguishable from normal activities of day-to-day living.

The issues for the Board's review are:

(1) Is claimant's left knee injury the result of an accident that arose out of and in the course of her employment with respondent?

(2) If so, is the disability that resulted from claimant's knee condition the result of the normal activities of day-to-day living?

### FINDINGS OF FACT

Claimant suffered a fall at work in April 2008, in which she injured her left hand and wrist. She later developed back pain. She filed an Application for Hearing on December 3, 2008, claiming that on or about April 28, 2008, she sustained injuries to her right upper extremity, low back, right lower extremity, including buttocks, and all areas affected.<sup>2</sup> Respondent denied it was responsible for claimant's back injury. In an Order dated February 17, 2009, the ALJ found claimant was injured out of and in the course of her employment from April 28, 2008, through June 21, 2008, and authorized medical treatment for claimant's back condition.<sup>3</sup> Respondent appealed this Order to the Board, and Board Member Shufelt affirmed the ALJ, finding: "This Board Member finds Hamilton has met

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<sup>2</sup> At the February 17, 2009, preliminary hearing, claimant testified that she injured her left upper and lower extremities, not her right. She described falling on her left side and injuring her left thumb, left wrist, left knee, and head. She said her entire left hip and left side were black and blue.

<sup>3</sup> Claimant, however, has not alleged a series of accidents.

her burden of proof to establish that her back condition arose out of and in the course of her employment with respondent.”<sup>4</sup>

Claimant testified that the pain in her low back went all the way down her right leg and locked in the right knee. Because of her right leg pain, claimant developed a limp. Then, on January 15, 2010, claimant was pulling parts in the stock room. She walked around a corner, and her left knee popped and buckled. She said she complained to her case worker that the limping was hurting her left knee for two months before the injury in January 2010. She testified that during that same time period, she also told her treating physician, Dr. Sandra Barrett, about her left knee pain.

Claimant said she does a lot of walking at her job. She said on January 15, 2010, however, she walked further than normal because she had to walk to and back from a meeting that was being held in a building other than the building in which she worked. After claimant’s knee popped and buckled, it was hard for her to walk. When she went home from work that day, she began using crutches to help her ambulate.

Claimant testified that she does not do a lot of physical activity at home because of her back and knee problems. She agreed, however, that she walks back and forth from her car to her home and from her car to work. She walks when she goes grocery shopping. She admitted that there was no difference from those activities than the activities she was doing in January 2010 when she rounded a corner and her knee popped.

Claimant has had no treatment for her left knee, but Dr. Barrett has examined it and ordered an MRI. Claimant testified that Dr. Barrett believed she tore the meniscus in her left knee from limping so long. Dr. Barrett’s February 11, 2010, office note indicates that she believes claimant’s left knee symptom is “secondary to her altered gait and increased transferring of weight onto the left side due to the ongoing back pain.”<sup>5</sup>

On April 15, 2010, claimant was seen by Dr. Naomi Shields at the request of respondent. Claimant gave Dr. Shields a history of her April 2008 accident as well as the January 2010 incident. Claimant told Dr. Shields that about a month and a half before the appointment, she was in bed and something in her left knee popped again. Claimant described it as a good pop and said her pain decreased after it. She complained of continued swelling through her leg down to her foot. Dr. Shields noted that claimant was not walking with a limp. After examining claimant, Dr. Shields diagnosed her with medial compartment osteoarthritis with a degenerative medial meniscus tear.

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<sup>4</sup> *Hamilton v. Ametek Advanced Industries, Inc.*, No. 1,043,276, 2009 WL 1314339 (Kan. WCAB April 29, 2009).

<sup>5</sup> P.H. Trans. (June 29, 2010), Cl. Ex. 1 at 1.

By agreement of the parties, claimant was examined by an independent medical examiner, Dr. Paul S. Stein, on September 7, 2010.<sup>6</sup> Claimant gave Dr. Stein a history of her April 2008 accident and injury to her left hand. She said that several weeks later, she developed pain in her low back that went down into the calf and foot. She said that she had been limping since June 2008, and in November 2008 she started having left knee pain, and that on January 15, 2010, while at work, her left knee popped and she had severe pain. After reviewing her medical records and performing a physical examination, Dr. Stein concluded that claimant's symptoms are

more likely than not an aggravation of the preexisting degenerative disease [which] occurred while [claimant's] altered gait was placing more stress on the left lower extremity. . . . Assuming the accuracy of the patient's reports regarding when her symptoms started, it is my opinion that there is a causal relationship between the work injury and the current left knee symptoms.<sup>7</sup>

#### **PRINCIPLES OF LAW**

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>8</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>9</sup>

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<sup>6</sup> Although Dr. Stein's independent medical examination report was not part of the record before the ALJ, it has been agreed by the parties that the report should be made a part of the record on appeal.

<sup>7</sup> IME report of Dr. Stein, filed October 21, 2010, at 7.

<sup>8</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>9</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>10</sup>

K.S.A. 2009 Supp. 44-508(e) defines "personal injury" and "injury":

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The Kansas Supreme Court, in *Boeckmann*,<sup>11</sup> denied workers compensation benefits, holding that

physical disability resulting from a degenerative arthritic condition of the hips which progressed over a period of years while the workman was employed is not compensable as an accident arising out of and in the course of his employment under the circumstances found to exist in the instant case.

Among the circumstances the court found to exist was that Mr. Boeckmann's disabling arthritis existed before his employment with Goodyear and that "the degenerative process will continue to progress long after his retirement."<sup>12</sup> The medical testimony was

that Mr. Boeckmann's hip problems, or the disabilities arising therefrom, were [not] caused by his work at the Goodyear plant; that his employment did not cause his condition to occur; that the hip condition had been a progressive process; that

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<sup>10</sup> *Id.* at 278.

<sup>11</sup> *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, Syl., 504 P.2d 625 (1972).

<sup>12</sup> *Id.* at 736.

increased activity was liable to aggravate the claimant's underlying problem but that almost any everyday activity has a tendency to aggravate the problem; that every time the claimant bent over to tie his shoes, or walked to the grocery store, or got up to adjust his TV set there would be a kind of aggravation of his condition. . . .

. . . .  
. . . The examiner found, on what we deem sufficient evidence, that any movement would aggravate Boeckmann's painful condition and there was no difference between stoops and bends on the job or off.<sup>13</sup>

Similarly, in *Martin*,<sup>14</sup> the Kansas Court of Appeals held that "[i]njuries resulting from risk personal to an employee do not arise out of his employment and are not compensable."

More recently, the Kansas Court of Appeals in *Johnson*<sup>15</sup> held:

In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"<sup>16</sup>

In *Anderson*,<sup>17</sup> the Kansas Court of Appeals held claimant's repetitive trauma injury compensable even though the offending activity was also performed apart from the employment because the employment required claimant to perform the activity more frequently than what claimant would do away from work.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>18</sup> The test is not

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<sup>13</sup> *Id.* at 738-39.

<sup>14</sup> *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, Syl. ¶ 3, 615 P.2d 168 (1980).

<sup>15</sup> *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3, 147 P.3d 1091, rev. denied 281 Kan. \_\_ (2006).

<sup>16</sup> *Id.* at 788.

<sup>17</sup> *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

<sup>18</sup> *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>19</sup> An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.<sup>20</sup>

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,<sup>21</sup> the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*,<sup>22</sup> the court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*,<sup>23</sup> the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

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<sup>19</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

<sup>20</sup> *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

<sup>21</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

<sup>22</sup> *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

<sup>23</sup> *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

In *Graber*,<sup>24</sup> the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was “a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back.”<sup>25</sup>

In *Logsdon*,<sup>26</sup> the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.

When a primary injury under the Worker’s Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

When a claimant’s prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Finally, in *Casco*,<sup>27</sup> the Kansas Supreme Court states: “When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury.”

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>28</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

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<sup>24</sup> *Graber v. Crossroads Cooperative Ass’n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

<sup>25</sup> *Id.* at 728.

<sup>26</sup> *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

<sup>27</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

<sup>28</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. \_\_\_, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>29</sup>

### **ANALYSIS**

Respondent admits:

Dr. Stein's opinion resolves the issue with respect to whether the claimant's knee injury is a natural and probable consequence of the initial injury to her low back causing radiculopathy. However, Dr. Stein's opinion does not resolve the legal question of whether the re-injury to the knee, while factually related, is legally related to the workers' compensation injury when it occurred as a result of walking, an activity of daily living.<sup>30</sup>

Claimant's left knee injury is compensable because it resulted as a direct and natural consequence of her compensable low back injury. As such, claimant does not have to prove that the knee was injured in her fall on April 28, 2008. And because the knee injury occurred as a natural consequence of the back injury, claimant likewise does not have to prove that her activities at work on January 15, 2010, constituted a new accident. Her current disability and need for treatment of her left knee are a direct and natural consequence of her original April 28, 2008, accident. Her disability is not the result of the natural aging process or the normal activities of day-to-day living. It is the result of her accident at work on April 28, 2008.

### **CONCLUSION**

Claimant's accident and left knee injury arose out of and in the course of her employment with respondent. Her disability is not the result of normal activities of daily living.

### **ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated June 29, 2010, is affirmed.

**IT IS SO ORDERED.**

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<sup>29</sup> K.S.A. 2009 Supp. 44-555c(k).

<sup>30</sup> Correspondence from respondent's attorney to the Board dated November 29, 2010, at 1 (filed with Division December 1, 2010).

**VICKIE S. HAMILTON**

**10 DOCKET NOS. 1,043,276 & 1,050,589**

Dated this \_\_\_\_\_ day of December, 2010.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: E.L. Lee Kinch, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge